

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 Case No.: 3:21-cv-00458-RCJ-CSD

4 FEI FEI FAN,
5 Plaintiff

Order

6 v.

7 YAN YAO JIANG and WEI WU,
8 Defendants

9 Pending before the court is Defendants' renewed motion for sanctions against Plaintiff.
10 (ECF No. 89.) Part of the motion relates to Defendants' claim that Plaintiff intentionally deleted
11 WeChat messages and text messages with defendant Jiang when Plaintiff knew or should have
12 known they were relevant to anticipated litigation. As a result, Defendants seek the imposition of
13 sanctions against Plaintiff, including termination of this action, an adverse inference instruction,
14 and an award of costs and fees incurred in bringing the motions related to the spoliated evidence.

15 A prerequisite to the imposition of sanctions under Rule 37(e) is that the information
16 "cannot be restored or replaced through additional discovery." Fed. R. Civ. P. 37(e). The
17 Advisory Committee notes that "[b]ecause electronically stored information often exists in
18 multiple locations, loss from one source may often be harmless when substitute information can
19 be held elsewhere." Fed. R. Civ. P. 37 Advisory Committee Notes to the 2015 Amendment. The
20 initial focus of the court's analysis, therefore, is on whether the lost information can be restored
21 or replaced, and if it can, "no further measures should be taken." *Id.*

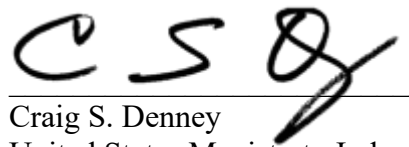
22 In her declaration filed in support of her response to Defendants' renewed motion for
23 sanctions, Plaintiff states that Jiang represented in an earlier state court proceeding that he

1 maintained his messages with Plaintiff. Neither Defendants' motion nor their reply addresses this
2 statement and whether *Defendants* retained records of the WeChat and text messages with
3 Plaintiff during the relevant time period. The court asked defense counsel at the hearing whether
4 there was an adequate replacement for the spoliated messages, but defense counsel's response
5 focused on the forensic examination of Plaintiff's devices and did not address whether
6 *Defendants* have maintained the messages.

7 On or before **12:00 p.m. on July 21, 2023**, Defendants shall file a declaration with the
8 court addressing whether they have maintained the WeChat and/or text messages with Plaintiff.

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10 **IT IS SO ORDERED.**

11 Dated: July 18, 2023

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13 Craig S. Denney
14 United States Magistrate Judge
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